Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

MARIA CECILIA ACOSTA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the broad wording of Federal Rule of Evidence 611(b) permit the Government to cross-examine a defendant, who is being tried for drug crimes, to suggest her guilt to the jury by the mere fact that she had some association with other persons who, themselves, at some time in the past had been arrested for or convicted of drug crimes, when there was no showing that those other persons had any connection to the crimes for which the defendant was then being tried and when there also was no showing that the defendant had any criminal involvement with those other persons?

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Maria Cecilia Acosta, petitions this court to review the judgment and opinion of the United States Court Of Appeals, Fourth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is unpublished. That opinion is reproduced in its entirety in the appendix to this petition.

BASIS FOR JURISDICTION

The opinion of the lower appellate court was filed on June 9, 1994.

This Court has jurisdiction to review a decision of a United States Court of Appeals pursuant to 28 United States Code Section 1254.

STATUTORY PROVISION INVOLVED

Federal Rule of Evidence 611(b) provides:

> Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

STATEMENT OF THE CASE

A North Carolina Highway Patrol officer stopped a car that was speeding on an interstate highway. The driver was a male named Esle-Leon. Ms. Acosta was in the back seat. Out of the hearing of Ms. Acosta, Mr. Esle-Leon related that he was rushing to New York City for medical treatment. The trooper became suspicious of Mr. Esle-Leon, because of the demeanor exhibited by that man. After providing his signature on a consent-to-search form, Mr. Esle-Leon opened the trunk of the car. At Mr. Esle-Leon's request, Ms. Acosta produced keys for locked pieces of luggage that were contained inside the trunk of

this car. Mr. Esle-Leon admitted to the police officer that the various square packages, which that officer discovered, contained coc[illegible]. The officer arrested Mr. Esle-Leon. The highway patrol officer also arrested Ms. Acosta, although this officer had not yet talked to her.

The arresting officer took both suspects to the police station, where both were turned over to an agent from the United States Drug Enforcement Administration. Mr. Esle-Leon agreed to cooperate with the DEA agent by assisting that agent in making a controlled delivery of the seized cocaine to its intended recipient in New York City. Mr. Esle-Leon informed that federal agent that he had made three prior deliveries of cocaine for the same person from whom he obtained this cocaine. When Mr. Esle-Leon stated that the recipient of this cocaine expected Mr. Esle-Leon to be with a woman, the DEA agent suggested a cover story to explain why Mr. Esle-Leon would be there alone. During the preliminary discussions between Mr. Esle-Leon and the DEA agent, Mr. Esle-Leon requested that the DEA agent not arrest Ms. Acosta, because, according to Mr. Esle-Leon, Ms. Acosta was neither involved in this crime nor involved in Mr. Esle-Leon's prior drug couriering.

The DEA flew Mr. Esle-Leon to New York City. The attempt to deliver the cocaine was unsuccessful. However, the DEA was ultimately able to connect the phone number used by Mr. Esle-Leon during this trip to a person named Francisco Luis Aguilar.

At trial, the Government established that Ms. Acosta was the person, who used her own credit card to rent the

car in which the cocaine was found.[1] When Mr. Aguilar was subsequently arrested, the police found a notebook on his person which contained various names and phone numbers. One of those notations had Ms. Acosta's nickname, i.e. "Ceci," and Ms. Acosta's business phone number. During an earlier arrest of Mr. Aguilar, the police found several of Ms. Acosta's business cards, two scraps of paper on which were written Ms. Acosta's middle name, Ms. Acosta's business phone number, and a business card from another person on the back of which was written "Maria Cecilia, Jesus David, Miami." Several other documents indicated that Mr. Aguilar had been in Miami, Florida – the city in which Ms. Acosta lived.

Inside Ms. Acosta's pocket book, the DEA found a small portable address book. That address book was introduced into evidence during the Government's case-in-chief. That address book had in excess of two hundred fifty (250) names and telephone numbers of all kinds written in it. One of the names, which was written inside, was the name "Luis" and written next to that name was the beeper number which Mr. Esle-Leon called in New York City and which belonged to the beeper that Mr. Aguilar possessed at the time of his subsequent arrest.

---

[1] During Ms. Acosta's subsequent testimony, the trial judge asked Ms. Acosta some questions regarding the fact that the rental form listed Ms. Acosta's home as Venezuela. The judge's insinuation was that Ms. Acosta was attempting to hide her identity at the time that she rented this car. This insinuation was specious, given the fact that Ms. Acosta used her own credit card, which was issued in her own name, to rent the car. The use of her own credit card would allow the most novice criminal investigator to identify her.

The above was the totality of the evidence upon which the Government sought to convict Ms. Acosta during its case-in-chief.

Mr. Esle-Leon testified for Ms. Acosta. Ms. Acosta was a beautician, with whom Esle-Leon had a ten-year friendship. Mr. Esle-Leon had a serious illness, which required kidney dialysis. Ms. Acosta helped care for Mr. Esle-Leon. Mr. Esle-Leon was originally from New York City and had a doctor and mother still there. Mr. Esle-Leon told Ms. Acosta that he had to go to New York City to investigate the possibility of receiving a kidney from his mother. Because of his poor financial status, Mr. Esle-Leon requested Ms. Acosta to use her credit card to rent a car for his trip.

Mr. Esle-Leon obtained the cocaine from Mr. Aguilar and did not tell Ms. Acosta that he would be couriering the drugs on this trip. According to Mr. Esle-Leon, at the time of his arrest, he told the highway patrol officer that Ms. Acosta had no knowledge of what he was criminally doing. Finally, Mr. Esle-Leon stated that he, himself, may have brought Aguilar to Ms. Acosta for the purpose of having Ms. Acosta cut Aguilar's hair.

Mr. Esle-Leon told the jury that he pled guilty to his crime without a plea agreement and was willing to testify for Ms. Acosta, knowing that he risked a greater sentence because he testified on her behalf.

Ms. Acosta testified in her own behalf. This woman originally lived in New York City, but moved to Miami, Florida where she lived for the last fourteen years. Ms. Acosta was a self-employed hair stylist who worked out of her home and made house calls. Ms. Acosta's clients

contacted her by telephone and beeper. Ms. Acosta admitted that the address-phone book was hers and one which she had for a long time. Inside that book were phone numbers of both business clients and people whom Ms. Acosta had met. Ms. Acosta used that book to call clients periodically to get business.[2]

Ms. Acosta recalled that Mr. Esle-Leon brought Mr. Aguilar to Ms. Acosta for the purpose of cutting his hair. Ms. Acosta also cut the hair of two girlfriends of Mr. Aguilar.

Ms. Acosta denied knowing that Aguilar was involved in illegal drug dealing, denied knowing that there was cocaine in the luggage at the time of her arrest, and denied any involvement with illegal drugs.

As previously noted, the Government introduced the portable address/telephone book that Ms. Acosta had in her purse at the time of her arrest. Concededly, this book was relevant evidence, because it had written inside Aguilar's phone number. That was the only relevance of that portable phone book to this case. During her own direct examination, Ms. Acosta sought to provide an innocent explanation for having Aguilar's phone number

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[2] The Government argued successfully on appeal that Ms. Acosta's testimony about this personal telephone directory opened the door for the cross-examination that became a legal issue on appeal. That portion of Ms. Acosta's direct examination is set out in full in the appendix to this petition for the purpose of establishing that this testimony did not open the door to what was done during cross-examination.

in her telephone book.[3] Ms. Acosta stated that the names and telephone numbers of clients were written in that book. A review of this phone book establishes that Ms. Acosta had all kinds of names and places written in that book. No one could argue in good faith that Ms. Acosta's testimony suggested that the entire phone book contained only names of clients of her business and was only a business phone directory, as opposed to a personal and business phone book.[4]

On cross-examination, the prosecutor asked Ms. Acosta a series of questions, purportedly about three (3) of the in-excess-of 250 names and telephone numbers, which were in that book. In pertinent part, the following questions were asked:

> Q. Now, naturally you don't know that Mr. Aguilar was a dealer in cocaine, did you?
>
> A. No, Sir.
>
> Q. I ask you to take a look at this address book and it's listed under the letter "I" and it's on the second page at the top and I ask you to read that to the jury?
>
> A. Ira Conales. * * *
>
> * * *
>
> Q. Are you further aware, Miss Acosta, that the individual who belongs to that beeper number was arrested in May of 1990 in New

---

[3] The entirety of this direct testimony is set out in the appendix to this petition.

[4] This telephone directory is too lengthy to include in the appendix to this petition.

Jersey for conspiracy to distribute fifty kilograms of cocaine?

A. I did not know, Sir.

Q. Ma'am, I'm opening this same book, Exhibit N[umber] 25, to the page marked "R" and the very first entry on that page, I believe, says Raoul and has a very long series of numbers beyond that; is that correct?

* * *

Q. Are you aware that one Raoul Calderone-Serna, S-E-R-N-A, to whom that beeper belongs, was arrested in June of 1990 in possession of fifty-six pounds of cocaine?

A. No, Sir, I don't know.

Q. You didn't know that?

A. No.

* * *

Q. Ma'am, I'm opening this up to the page marked "F" and about two thirds of the way down is the word or name Fernando with the number 366722622.

A. Yes.

Q. Do you know who that person is?

A. No, I don't remember. I can't remember every single person that I have there.

Q. Are you aware that the person to whom that number belongs is one Fernando Mesa-Suarez?

A. No, Sir I don't know.

Q. Are you aware that he was arrested in August of 1990?

A. No, Sir.

Q. In Miami, Florida for trafficking in Methamphetamines?

* * *

Q. And of course, L[uis] Aguilar's number, you didn't know his involvement with the drug business either?

During this trial the Government never even proffered that it had any evidence that Ms. Acosta was connected to any criminal behavior involving either Mr. Conales or Mr. Calderone-Serna or Mr. Mesa-Suarez – let alone the particular crimes about which the prosecutor made inquiry.[5] Likewise, during this trial the Government never even proffered that it had any evidence that Mr. Aguilar was connected to any criminal behavior involving either Mr. Conales or Mr. Calderone-Serna or Mr. Mesa-Suarez.[6] Ms. Acosta never mentioned any of these three names during her testimony on direct examination.[7] From a logic perspective, there was no connection between the facts of the pending charges and this

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[5] The presentence report for Ms. Acosta established that Ms. Acosta had never previously been arrested for a drug crime. The questions themselves establish that the crimes allegedly committed by those three men were committed months before the highway patrol officer found the cocaine involved in Ms. Acosta's prosecution.

[6] The absence of a connection between any of these three men and Mr. Aguilar meant that the Government could not use this line of cross-examination to impeach Ms. Acosta's testimony that she did not know that Aguilar was involved in the illegal drug trade.

[7] Ms. Acosta's general testimony about her address/telephone book might permit argument that the Government could ask Ms. Acosta whether she knew these three people and if they

line of inquiry other than the fact that the phone numbers of Conales, Calderone-Serna and Mesa-Suarez were in that portable telephone directory.

The defense repeatedly objected to this line of cross-examination on numerous grounds. The trial judge overruled every objection, stating: "It's a notebook that was in the same vehicle as the thirty-three kilos of cocaine and has Aguilar's number in it. There's indication he's a cocaine dealer. If he [,the prosecutor,] wants to go through every number he can." The trial court also stated that the prosecutor could have the DEA agent testify to this on rebuttal based on a report and the book. The trial judge did permit a continuing objection to this cross-examination.

In this simple case, the jury spent five hours of deliberation before convicting Ms. Acosta of the crimes of possession of cocaine with intent to distribute and of conspiracy to commit that crime.

Following her conviction, Ms. Acosta did not admit guilt in order to obtain a reduction under the sentencing guidelines for acceptance of responsibility. Ms. Acosta persisted in maintaining her innocence during the sentencing proceeding.

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were business clients. However, the Government still would not be justified in bringing out the arrest record of any of those three persons. The arrest records of those three men could not logically have led a jury to conclude that Ms. Acosta never dealt with or never engaged in lawful business with them.

On direct appeal, the Fourth Circuit held that the "guilt-by-association" line of cross-examination was not improper. That court held that this inquiry by the prosecution was permissible because of Federal Rule of Evidence 611(b) and the fact that Ms. Acosta's testimony about the phone book during her direct examination opened the door to this line of inquiry.

REASONS FOR GRANTING THE PETITION

This Court has long taken the position that guilt by association is a discredited doctrine. *Uphaus v. Wyman*, 360 U.S. 72 at 79 (1959). However, history belies the success of this technique of persuasion in accomplishing the desired goal of the inquisitor. It is because of this stark reality of likelihood of success that prosecutors *still* use this technique to sway juries by emotion and disapproval, rather than by rational consideration of evidence relevant to the legal issues being tried in a particular case. *See Dawson v. Delaware*, ___ U.S. ___, 112 S.Ct. 1093 (1992) (evidence of membership in particular racist gang was totally without relevance to that particular sentencing hearing); *cf. Pierson v. Ray*, 386 U.S. 547 at 551, 552 n.6 (1967) (cross-examination of civil rights ministers as to whether their views on racial justice were similar to those held by Communist Party).

Here, the cross-examination employed had no lawful logical relevance to the crimes for which Ms. Acosta was

being tried.[8] Its purpose was to impermissibly smear Ms. Acosta both for the purpose of having the jury disbelieve her testimony and for the purpose of having the jury take this innuendo as substantive evidence of Ms. Acosta's guilt.

This Court should pronounce that the facially overly-broad wording of Federal Rule of Evidence 611(b) is not without legal limits. Even before this federal rule of evidence became law, this Court noted that the breadth of the cross-examination of a defendant is limited to matters relevantly raised by that defendant's direct examination. *Brown v. United States,* 356 U.S. 148 at 154-155 (1958) (group affiliation relevant in context of denaturalization proceeding). This rule of evidence should not be – and was not intended to be – a means by which the Government can parade past the jury a litany of prejudicial matters that have been established or connected to the defendant only by unsubstantiated innuendo. *Cf. Huddelston v. United States,* 485 U.S. 681 at 689 (1988).

The lower appellate court's position that Ms. Acosta's testimony opened the door for this particular line of cross-examination is transparently erroneous.[9]

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[8] Because there was no evidence that Ms. Acosta was involved in any of the drug crimes for which Conales, Calderone-Serna and Mesa-Suarez had been arrested, this cross-examination was not admissible collateral crime evidence. *Huddelston v. United States,* 485 U.S. 681 at 685, 689 (1988) (bad act evidence only admissible if there is sufficient evidence to support jury finding that defendant committed the similar act).

[9] The pertinent portion of that testimony is contained in the appendix to this petition.

Consequently, there is no basis to avoid a direct discussion about the impropriety of this "guilt-by-association" approach to obtaining guilty verdicts.

In recent years, this Court has come to recognize more and more the national significance of evidentiary issues. *E.g., Williamson v. United States,* ___ U.S. ___, 114 S.Ct. 2431 (1994); *United States v. Abel,* 469 U.S. 45 (1984).

This bespeaks a recognition that evidentiary issues constitute the greatest amount of judicial labor in the day-to-day operation of the state and federal trial courts. There is no trial at which Federal Rule of Evidence 611(b) is not employed. Nevertheless, the only majority opinion of this Court to even mention this constantly-used provision is *United States v. Abel,* 469 U.S. 45 at 51 (1984).

While this "guilt-by-association" issue comes to this Court in criminal clothing, a ruling on this issue is just as applicable to civil litigation. Moreover, because the First Amendment right to freedom of association is at the heart of this litigation, a ruling on this case also carries over to such improper conduct, when committed during the civil and criminal trials conducted in the trial courts of the fifty States.

Published lower federal appellate court opinions have addressed this particular issue and ruled for the defense. *E.g., United States v. Dickens,* 775 F.2d 1056 (9th Cir. 1985); *United States v. Romo,* 669 F.2d 285 (5th Cir. 1982); *United States v. Crawford,* 438 F.2d 441 (8th Cir. 1971); *United States v. Vigo,* 435 F.2d 1347 (5th Cir. 1970). The fact that the Fourth Circuit chose to bury its conflicting decision in an unpublished opinion should not stand in the way of review by this Court.

This issue presents itself in the context of an evidentiary legal issue. However, this issue really addresses fundamental First Amendment rights. Criminal associations are not protected by either the Due Process Clause or the First Amendment. *Scales v. United States*, 367 U.S. 203 at 225, 228-229 (1961). However, non-criminal association – even with people who are criminals – is protected by the First Amendment. The fact that such activity is constitutionally protected imposes a special obligation on a court to examine critically the basis on which liability was imposed. *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 at 908, 915, 918-920, 933 n.8 (1982). Although the precise boundary of the First Amendment freedom of association has not been set by the Supreme Court, the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights and receives protection as a fundamental element of personal liberty. *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 617-618 (1984). Guilt by association, alone, is an impermissible basis to deny First Amendment rights. *Healy v. James*, 408 U.S. 169, 186 (1972).

Today, stockbrokers, lawyers, doctors, government officials at the highest levels of government, and, yes, even federal judges, are arrested for and convicted of crimes. The innocent, as well as the guilty, can have their phone numbers and names in a personal phone book of a criminal. Likewise, the innocent, as well as the guilty, can have the phone numbers and names of criminals in their personal phone book.

A final observation supports the granting of review in this case. Association with criminals is a function of economic status, ethnicity and race in that these matters do affect where one lives and who one meets socially and while conducting lawful business. Because of this, use of a "guilt-by-association" trial tactic by the Government is especially pernicious.

CONCLUSION

The petition for a writ of certiorari should be granted to review this recurring and dangerous cross-examination technique.

Respectfully submitted,

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APPENDIX

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Opinion Of The Lower Appellate Court.....App. 1

Excerpt Of Direct Examination Of Defendant Acosta .....App. 7

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MARIA CECILIA ACOSTA, *Defendant-Appellant.*	No. 91-5335

Appeal from the United States District Court
for the Eastern District of North Carolina, at Fayetteville.
Malcolm J. Howard, District Judge.
(CR-90-71)

Submitted: November 17, 1993

Decided: June 9, 1994

Before MURNAGHAN and HAMILTON, Circuit Judges,
and SPROUSE, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Walter A. Reynoso, Coconut Grove, Florida; Arthur Joel Berger, Miami, Florida, for Appellant. Margaret Currin, United States Attorney, Gwynne L. Skinner, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Maria Cecilia Acosta appeals her conviction of conspiracy to distribute and possession with intent to distribute cocaine in violation of 21 U.S.C.A. § 846 (West Supp. 1993) and possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) (1988) and 18 U.S.C. § 2 (1988). On appeal, she complains of the admission of evidence and the enhancement of her sentence for obstruction of justice. We affirm.

According to testimony during the Government's case in chief, Acosta rented a car in Miami in preparation for a trip to New York with her co-conspirator Ricardo Esle-Leon. They locked two pieces of luggage containing thirty kilograms of cocaine in the trunk of the rental car.

On the way to New York, while in North Carolina, Esle-Leon was pulled over for speeding. Acosta was in the back seat of the car. When asked, Esle-Leon presented his driver's license and the car rental agreement which was in Acosta's name. The address on the agreement was Caracas, Venezuela. Esle-Leon consented to the search of the vehicle and Acosta got out when Esle-Leon opened the trunk.

The bags inside the trunk were locked and the trooper asked for the keys. The trooper testified that Acosta had the keys on her person and handed them to him. The cocaine was found in ten kilograms and twenty

kilogram bags. The trooper arrested Acosta and Esle-Leon. (Acosta's address book was found during the search incident to arrest.)

Esle-Leon cooperated with the Drug Enforcement Agency and proceeded to New York to assist in a controlled delivery. Esle-Leon went to a telephone booth and called a beeper number. During the course of the conversation, the person Esle-Leon called, later identified as Francisco Louis Aguilar, was apparently frightened that something had gone awry. References were made to "she" having stayed in town and the fact that Esle-Leon was alone. The controlled buy never took place. Aguilar was later arrested. A notebook with Acosta's name, her beeper number, and several business cards were found on his person.

During the Defendant's case, Esle-Leon testified that he had not told Acosta about the cocaine and that the "she" referred to in the conversation with Aguilar referred to the cocaine. Acosta testified that she was a hairstylist, that her business cards were given to clients for themselves and for other people. She rented the car to take Esle-Leon to a medical appointment in New York. She also stated the keys were in the car ashtray, not on her person when the trooper stopped Esle-Leon for speeding. On cross-examination, she stated that the Venezuelan address was placed on the car rental agreement to insure a cheap rate for the car. Acosta was found guilty by a jury.

Acosta asserts that the district court abused its discretion in permitting the Government to cross-examine her concerning the criminal record of three individuals

whose names were found in her address book. The address book was admitted into evidence with no objection in the Government's case-in-chief.

On direct examination, Acosta testified that the information in her address book included names and numbers of her clients and acquaintances. Acosta explained the fact that Aguilar's number was included in her book by stating that he was a client and had told her to call him when she came to New York for references for more clients. On cross-examination, the Government asked whether Acosta knew of the criminal record of three individuals whose names appeared in her book. She denied knowledge of the drug trafficking arrests of those individuals.

Under Fed. Rule of Evid. 611(b), cross-examination "should be limited to the subject matter of the direct examination and matters affecting the credibility of witnesses." Here Acosta opened the door for a discussion on cross-examination of the contents of her address book and the nature of her relationship with the individuals whose names appeared there. The district court did not abuse its discretion in permitting this line of questioning. *United States v. Hill*, 766 F.2d 856 (4th Cir.), *cert. denied*, 474 U.S. 923 (1985); *United States v. Atkinson*, 512 F.2d 1235, 1238 (4th Cir. 1975); *United States v. Simpkins*, 505 F.2d 562 (4th Cir. 1974), *cert. denied*, 420 U.S. 946 (1975).

Acosta challenges the enhancement of her sentence for obstruction of justice. In *United States v. Dunnigan*, 61 U.S.L.W. 4180, 4184 (U.S. 1993), the Supreme Court held that such an enhancement was not an unconstitutional burden on the defendant's right to testify in her own

behalf. The Court found the enhancement provision part of the sentencing scheme designed to determine the appropriate type and extent of punishment after the issue of guilt has been resolved. Acosta's general challenge to the enhancement of her sentence has no merit.

The question in this case, however, is whether the district court made the independent finding necessary to establish an obstruction of justice. While separate and clear findings with respect to each element of perjury are preferred, a finding of obstruction of justice that encompasses all factual predicates for a finding of perjury will suffice. *Dunnigan*, 61 U.S.L.W. at 4183; *see United States v. Burnette*, 981 F.2d 874, 879 (6th Cir. 1992); *United States v. Lawrence*, 972 F.2d 1580, 1583 (11th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3479 (U.S. 1993); *United States v. Cunavelis*, 969 F.2d 1419, 1423 (2d Cir. 1992); *United States v. Benson*, 961 F.2d 707, 709 (8th Cir. 1992); *United States v. Lozoya-Morales*, 931 F.2d 1216, 1218-19 (7th Cir. 1991), *cert. denied*, 61 U.S.L.W. 3479 (U.S. 1993).

In this case, the district court made no explicit finding of perjury. It stated that the Defendant's objection to the obstruction of justice enhancement was overruled. The issue, however, was framed precisely. In the presentence report, the probation officer increased Acosta's offense level for obstruction of justice. The basis for the adjustment was her testimony that she did not know of the cocaine in the trunk and that she retrieved the luggage keys from inside the vehicle when the officer requested them. Acosta objected to the enhancement, denying that she committed perjury.

At the sentencing hearing, the issue was discussed at length. The Government argued that Acosta had concocted a false story; in taking it upon herself to testify, under oath, she obstructed justice. In addition to the examples noted in the probation report, the Government claimed that Acosta lied with respect to the car rental contract and ownership of a home.

The application notes to the guidelines providing examples of conduct which obstructs justice were identified. Note 1(c) states that testifying untruthfully constitutes obstruction. Acosta denied that this testimony was sufficient to enhance her offense category. At the close of the argument, the district court overruled the objection to the enhancement.

This ruling by the district court, in the context in which it occurred, is sufficient to show that a finding of perjury was made. The court's statement is sufficient to show that it accepted the disputed allegations and considered them. While the better practice would be to make explicit findings, the district court's ruling is sufficient. *See United States v. Romulus*, 949 F.2d 713 (4th Cir. 1991) (remand unnecessary where defendant admitted intent to deceive), *cert. denied*, 60 U.S.L.W. 3717 (U.S. 1992).

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

EXCERPT OF DIRECT EXAMINATION OF DEFENDANT ACOSTA – TRANSCRIPT FOR FEBRUARY 21, 1991 AT PAGES 123-125:

* * *

[123] Q. NOW, LET ME SHOW YOU WHAT HAS BEEN MARKED AS GOVERNMENT'S EXHIBIT 25 AND TELL ME IF YOU RECOGNIZE THAT?

A. YES. IT'S MY NOTEBOOK.

Q. IS THAT AN ADDRESS AND TELEPHONE BOOK?

[124] A. YES.

Q. HOW LONG HAVE YOU HAD THAT BOOK?

A. IT'S – I HAVE HAD IT A LONG TIME. YOU CAN SEE HOW IT IS.

Q. ABOUT HOW MANY TELEPHONE NUMBERS DO YOU HAVE WRITTEN IN THERE?

A. I DON'T KNOW, MANY.

Q. NOW, WHAT KINDS OF NUMBERS DO YOU HAVE IN THERE? WHAT KIND OF PHONE NUMBERS?

A. I HAVE NUMBERS, TELEPHONE NUMBERS OF PEOPLE THAT I HAVE CUT THEIR HAIR.

Q. WHAT ELSE?

A. PEOPLE THAT I HAVE MET.

Q. CLIENTS?

A. YES, CLIENTS. THAT'S WHAT I'M TELLING YOU, PEOPLE THAT I HAVE CUT THEIR HAIR.

Q. AND WHAT IS THE PURPOSE OF HAVING TELEPHONE NUMBERS OF PEOPLE WHOSE HAIR YOU HAVE CUT?

A. I HAVE ALWAYS LIKED TO HAVE RECORDS OF THE PEOPLE WHO I CUT HAIR. NOT ONLY THIS ONE BUT I ALSO HAVE AN APPOINTMENT BOOK.

Q. WHAT USE WOULD A TELEPHONE NUMBER OF SOMEONE'S HAIR YOU WOULD CUT BE TO YOU?

A. FOR ME, A LOT.

Q. WHAT SORT OF HELP? WHAT CAN YOU DO WITH THEM?

[125] A. BECAUSE I SOMETIMES CALL THEM. I MIGHT CALL SOME OF THEM EVERY TWENTY-EIGHT DAYS OR A MONTH OR MONTH AND-A-HALF.

Q. HOW WOULD THEY CONTACT YOU IF THEY WANTED YOU TO CUT THEIR HAIR?

A. WITH MY TELEPHONE NUMBER. THEY LEAVE A MESSAGE IN MY ANSWERING MACHINE OR ELSE THEY CALL ME AT THE BEEPER.

Q. WHAT WOULD YOU DO TO ESTABLISH CONTACT WITH THEM?

A. BECAUSE THEY LEAVE ME THEIR TELEPHONE NUMBER OR WHEN THEY CALL ME TO MY BEEPER I CALL RIGHT AWAY.

Q. ALL RIGHT. AND WHAT IF YOUR BEEPER DOESN'T CATCH THE NUMBER OR IF YOUR PHONE ANSWERING MACHINE DOESN'T GET THE NUMBER, THEN HOW WOULD YOU CONTACT THEM?

A. WITH MY TELEPHONE BOOK.

Q. ALL RIGHT. NOW, LET ME CALL YOUR ATTENTION TO A PHONE NUMBER THAT WAS TESTIFIED TO AND MARKED. THIS TELEPHONE NUMBER. DO YOU RECOGNIZE OR KNOW WHAT THAT TELEPHONE NUMBER IS; WHO IT IS FOR?

A. YES.

Q. AND HOW DID YOU GET THAT NUMBER? WHY DID YOU PUT IT THERE?

A. BECAUSE THIS TELEPHONE NUMBER BELONGS TO L[UIS AGUILAR] AND RICHARD BROUGHT HIM FOR ME TO CUT HIS HAIR.

Q. RICHARD IS MR. ESLE?

A. YES, MR. ESLE.

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